

## INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT NONRULE POLICY DOCUMENT

**Title: IDEM Response to SEA 349 (1996)**

Identification Number: None

Date Originally Adopted: **March 29, 1999**

Dates Revised: None

Other Policies Repealed or Amended: None

Brief Description of Subject Matter: Consideration of when solid waste management districts must follow the 349 process noted in statute.

Citation Affects: IC 13-21-3-14.5

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### **Background**

Pursuant to IC 13-20-22-2.1, IDEM adopted non-rule policy OPPTA-97-1. The policy was published in the September 1, 1997 *Indiana Register*. It defined how IDEM will consider economic need and displacement of private sector services in source reduction and recycling grants. With regard to grants to solid waste management districts for the purchase of equipment, the policy noted that a district's compliance with the requirements of IC 13-20-7-14.5 satisfied the policy. Those requirements are commonly referred to as the "SEA-349 Protocol" after the Senate Enrolled Act adopted in 1996 that created the provision.

The SEA-349 Protocol requires that a district must go through a formal review process when it contracts for or undertakes to provide waste management services. There are several exemptions to the requirement that "grandfather" certain existing services. The process requires that a district notify parties requesting the notice that the district may be offering waste management services. Then the district board must adopt a resolution determining that the district must either provide solid waste management services by means of its own work force or contract with a person to provide solid waste management services. This resolution must be based on a specific findings of fact.

After implementing the policy, IDEM has determined that certain provisions of IC 13-20-22-2.1 are ambiguous. The most critical ambiguity involves IC 13-21-3-14.5(a)(1) which exempts "the continuation of waste management services that a solid waste district provides with its facilities or work force before March 15, 1996" from the SEA-349 Protocol. The ambiguities have created delays in the process IDEM follows to evaluate grants because districts may not follow the entire SEA-349 Protocol. They have also resulted in confusion among the districts and other interested parties as they implement recycling projects.

## **Purpose**

This non-rule policy document addresses ambiguities that IDEM has identified in IC 13-21-3-14.5 that affect the successful implementation of its source reduction and recycling grants program.

## **Exemption for Continuation of Waste Management Services - IC 13-21-3-14.5(a)(1)**

Services provided by a district before March 15, 1996 can be continued after that date without going through the SEA-349 Protocol. Under this exemption, it is presumed that a district can renew a contract for these existing services without following the SEA-349 Protocol if the original contract contained a provision for automatic renewal. It can also continue to provide the service with its own work force. If the contract terminates by its terms or is terminated for cause, then SEA-349 Protocol must be followed.

If a service was not offered by a district before March 15, 1996, the district must go through the SEA-349 Protocol for these new services.

The ambiguity arises where districts expand and significantly alter existing services. The question is when these changes are a continuation of services that remain “grandfathered” under the exemption found at IC 13-21-3-14.5(a)(1).

IDEM interprets this exemption in two different ways depending on whether the expansion or significant alteration was a part of the 20-year district plan approved by IDEM prior to March 15, 1996 for each of the districts. This plan identified how the district will fulfill its statutory responsibilities including how it will reach the 35% by 1996 and 50% by 2001 waste diversion goals.

IDEM considered an alternative interpretation that does not acknowledge the role of the 20-year district plan. This plan was adopted after public notice and comment and approved by IDEM. Under this interpretation, districts would not be given any credit if the services they offered were partially underway on March 15, 1996 and the complete set of services were specifically included in the district plan. Considering that the district plan is the guiding document for the district activities and the exemption is in the chapter establishing the district plan, IDEM does not believe that this alternative interpretation is the most appropriate one.

If the expansion or significant alteration of services is a part of a current, approved district plan, IDEM will interpret the exemption broadly provided the services are allowed under current law. If it is not a part of the plan, IDEM will interpret the exemption narrowly. IDEM believes that this approach is appropriate because the plan and its amendments are only approved by IDEM after there has been public review and comment at the district level, evaluation and adoption by the district board, and IDEM analysis to confirm consistency with statutory requirements. In general, this process is more rigorous than the SEA-349 Protocol. The following is a more detailed explanation of the two expansion situations noted above.

#### **A. If Service NOT in plan on March 15, 1996**

Where the expansion or significant alteration of services is not a part of the plan, IDEM believes that a district should follow the SEA-349 Protocol unless the change meets both 1. and 2. of the following circumstances:

1. It only modifies the materials collected within one of three categories: organic material such as yard waste; recyclable commodities such as paper, glass, metals and plastics; and household hazardous waste and problem waste such as used oil, pesticides, tires and appliances. Changes within these three categories will not trigger the SEA-349 Protocol.

For example, adding a household hazardous waste program would not be viewed as a continuation of a drop-off program for aluminum cans. However, adding tree stumps to a yard waste collection program would be a continuation of services.

2. It reflects only greater participation in the program by the program's customers. For example, a new contract that adjusts a curbside recycling collection route is exempt if the routes were due to increased participation by the program's customers. Greater participation does not include:
  - a. Change in the geographical area serviced;
  - b. Change in the types of customers serviced (i.e. residential, commercial);
  - c. Change in the number of facilities; or
  - d. Change in the types of equipment in the facility. For purposes of equipment, IDEM will use its definition found in its policy implementing IC 13-20-22-2.1.

The SEA-349 Protocol must be followed for any of the situations identified in 2.a. to 2.d.

#### **B. If Service IS in Plan on March 15, 1996**

Where the expansion or significant alteration of services is a part of the plan, IDEM believes that a district is required to follow the SEA-349 Protocol only when there is a change in the geographical area serviced or a change in the types of customers serviced. Expanding the number of facilities or buying new equipment as anticipated by the plan is a continuation of services and the SEA-349 Protocol does not have to be followed.

To qualify for this broader interpretation of the exemption, in awarding of grants to districts, IDEM will require that all amendments to the district plan are current.

#### **Reasonableness of Cost - IC 13-21-3-14.5(c) and (f):**

A district that is required to go through the SEA-349 Protocol, must evaluate the reasonableness of cost of the waste management services. This evaluation is required under the statute to determine whether or not the district has the authority to provide the services. Where the private sector is willing and able to provide waste management services at a reasonable cost to the district, the district may not perform the services. And where the services are currently available in the district at a reasonable cost, the district may not perform the services with its own work force or contract with a person to provide the services.

When conducting an evaluation, districts shall:

1. Compare the cost of the same levels of service provided in the district or in similar demographic areas within Indiana; and
2. If it wishes to provide the service with its own facilities or work force, disclose the entire cost of providing the service by the district including:
  - a. Subsidies arising from taxes, fees, grants, or intergovernmental transfers;
  - b. In-kind contributions of real estate, interests in real estate, equipment, personnel, or other assets;
  - c. Discounts; and
  - d. Tax exemptions.

IDEM recommends that districts survey the services offered by the private sector within the district. If no valid comparisons are available, districts should survey the surrounding districts or districts with similar demographics, and then the state. IDEM will provide assistance in identifying comparisons as needed. IDEM does not recommend that districts request bids or proposals from the private sector in order to determine the reasonable cost of services.

#### **Scope of Services:**

A district that is required to go through the SEA-349 Protocol may choose to comply with IC 13-21-3-14.5 by adopting a resolution covering services it anticipates offering in the next one to two years. This approach may be especially appropriate where the district is expanding services that did not qualify for the “continuation of waste management services” exemption described above. The reasonable cost evaluation should be broken down into each type of service and not treated as a single unit. If the private sector raises questions about the merits of one portion of the proposal, the district board may choose to adopt the portions of the proposal not affected by the questions.

#### **Notice to Interested Parties - IC 13-21-3-14.5(e):**

A district that is required to go through the SEA-349 Protocol must notify any person that delivers an annual written request for notices before January 1 of any public meeting held pursuant to the SEA-349 Protocol. The notices must be sent first class mail to last known address.

IDEM encourages districts to notify all potentially affected parties it knows of about its plans to offer waste management services whether or not the parties provided the annual request described under IC 13-21-3-14.5. This notice should be made as early as possible in the process and should include a description of its plans. A one- or two-page summary should be sufficient for most plans. The notice should clearly identify for each project the:

1. Name of the project;
2. Types of materials collected;
3. Geographical area serviced;
4. Types of customers serviced (i.e. residential, commercial);
5. Number of facilities; and
6. General description of the types of equipment in the facility.

If a potentially affected party raises concerns or asks questions, the district should meet with the party and try to reach a resolution to the issue. Provided the notice and response were made in a timely and effective manner, the district board should not act on the resolution until this meeting between the district and potentially affected parties has occurred.

Districts have additional statutory requirements of notice by publication under IC 5-3-1, not referenced or explained in this policy document.

**Board Resolution - IC 13-21-3-14.5(d):**

A district that is required to go through the SEA-349 Protocol must adopt a Board resolution pursuant to IC 13-21-3-14.5(d) before providing the solid waste management services. The board resolution should consist of three parts:

1. Determination that the district must either provide solid waste management services by means of its own work force or contract with a person to provide solid waste management services.
2. Statement of conclusions that:
  - A. The solid waste management service is not currently available in the district at a reasonable cost; and
  - B. Providing the solid waste management service by means of its own work force or by contract will benefit the public health, welfare, and safety of residents of the district.
3. Findings of fact supporting the conclusions. IDEM believes that the finding of fact should be detailed enough to provide the reader with an understanding of the steps taken by the district to justify the conclusions. For plans where the private sector is not believed to be particularly active such as household hazardous waste, the finding may only be several paragraphs long.

At a minimum, IDEM believes that the finding of fact should address: description of services being considered including population served and key features of services offered; description of similar services currently offered within the district; explanation of the additional benefits to the public health, welfare, and safety of residents of the district from the services being considered; contacts made by district to determine if reasonable cost of services are currently available (list should be suitable); and reasonable cost of solid waste management services including a summary explaining how the estimate was derived and why any estimates of similar services were rejected. The cost should be presented as a total and a cost per unit serviced such as cost per participant, per household, per month, etc. When addressing the reasonable costs issue, the district should note the requirements of IC 13-21-3-14.5 (f)(2)(A) through (D).

**Board Decision:**

The board has the authority to act where the statutory criteria are met. The board does not have to wait until all questions or concerns are met. Where effective efforts are made to reach consensus, the board has the responsibility to act in the best interests of the district in implementing its 20-year plan, in achieving the waste diversion goals, in meeting the needs of its constituents, and in avoiding displacement of private sector service providers.

Where the board elects not to pursue an item specifically mentioned in its plan, IDEM expects that the district will submit an amendment to its plan pursuant to IC 13-21-5-18. Amendments to the plan are required when a decision affects:

1. A program involving a facility that requires a permit from or registration with IDEM.
2. A program or involving a facility for processing recyclable materials;
3. A program for collecting recyclable materials; or
4. A major education program.

Likewise, a decision to pursue a program identified in items 1. to 4. above that is not in the current version of the district plan would require an amendment to the plan.